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RAY-O-VAC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Seventh Circuit
and
BRIEF OF PETITIONERS
In Support of Petition.

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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. .....

THE GOODYEAR TIRE & RUBBER COMPANY, INC.
and
GENERAL DRY BATTERIES, INC.,
Petitioners,

vs.

RAY-O-VAC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Seventh Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, The Goodyear Tire & Rubber Company Inc. and General Dry Batteries, Inc., respectfully pray for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review a judgment in that Court entered June 5, 1943. A transcript of the Record in the case, including the proceeding in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was brought by Ray-O-Vac Company in the District Court of the United States for the Eastern District of Illinois, to enjoin the alleged infringement of claims 1, 2 and 3 of Letters Patent No. 2,198,423 for a Leakproof

Dry Cell for use in flashlights. The District Court (Judge Walter C. Lindley)* held the claims in suit valid and infringed and granted an Injunction and ordered an accounting. An Order was entered (Rec. p. 153) by the District Judge holding in abeyance the matter of an accounting until the Mandate is received from the Circuit Court of Appeals.

An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit which Court (opinion by Judge Evan A. Evans) affirmed the decision of the lower Court. The opinion of the District Court and the Findings of Fact and Conclusions of Law are found in the Record at pages 126-139, inclusive. The opinion of the Circuit Court will be found in the Record at pages 247-250, inclusive.

The patent in suit is owned by Respondent, Ray-O-Vac Company, a Wisconsin corporation, a large battery manufacturer, having its principal place of business at Madison, Wisconsin. The suit was filed against the Goodyear Tire & Rubber Company, Inc., a Delaware corporation having a principal place of business at Kankakee, Illinois. General Dry Batteries, Inc. is the manufacturer of the alleged infringing dry cells and intervened by stipulation and has had full control of the defense of the case.**

The Anthony patent in suit relates to a so-called leakproof dry cell for use in flashlights. All that the patent discloses is the application of a metal sheath to a conventional flashlight dry cell for the purpose of preventing the liquid contents of an exhausted or discharged dry cell from leaking and coming into contact with the flashlight casing.

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* The District Judge (Judge Lindley), who decided this case, frequently sits as a Circuit Judge on the Seventh Circuit Court of Appeals.

** The Ray-O-Vac Company was invited to file suit against General Dry Batteries, Inc. in the Sixth Circuit; but instead the suit was filed against a dealer located at Kankakee, Illinois, in the Seventh Circuit.

The problem arises when the cells are dead and are left in the flashlight case for a considerable period of time. Exhausted dry cells, when left within flashlight case, sometimes leak and swell and become difficult to remove. The prior art discloses a metal sheath surrounding a dry cell which tightly embraces the cell for the same purpose and functions in substantially the same manner. The accused dry cell and the cell disclosed in the Anthony patent are quite different in structure and in theory of operation. In order to find infringement the Court had to give the claims in suit a broad interpretation.

In substance, both the District Court and the Court of Appeals interpreted the claims in suit broadly to cover enclosing the usual flashlight dry cell in a metal sheath which tightly embraces both ends of the cell, notwithstanding the fact that the prior art discloses every single element of the claim performing the same function in the same manner.

By its decision, adjudging the claims in issue broadly valid, notwithstanding the prior art, and attributing to the patentee the status of an inventor, the Circuit Court of Appeals decided an important principle of Patent Law peculiarly affecting the armed forces and the public interests under the conditions now existing in a way probably in conflict with both the letter and spirit of the applicable decisions of this Court and particularly in

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84;

Atlantic Works v. Brady, 107 U. S. 192, 199.*

* The following is quoted from *Walker on Patents*, Deller's Edition, Vol. I, page 138:

"'To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our

During the pendency of the application for the patent in suit a certain claim was canceled and abandoned (original claim 5) and not recaptured.* By its decision, validating the claims in suit and giving to them a meaning and construction which embraces the claim so abandoned and canceled, the Circuit Court of Appeals recaptured from the public and for Respondent the subject matter of such canceled and abandoned claim. The decision so holding is believed to be in conflict with

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211;

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 125, 126, 86 L. Ed. 736.

By its decision, apparently in conflict, upon fundamental principles of Patent Law, with the foregoing decisions of this Court, the Circuit Court of Appeals for the

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knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accounting for profits made in good faith. (*Atlantic Works v. Brady*, 107 U. S. 192, 199, 27 L. Ed. 438, 440 (1882); see also *Thompson v. Boisselier*, 114 U. S. 1, 11, 29 L. Ed. 76, 80 (1885); *Western E. Co. v. Rochester Tel. Co.*, 145 Fed. 41, C. C. A. 2 (1906).)'

This opinion of Justice Bradley is now a classic. Many judges since have administered it as law."

* Cancelled claim 5 and claim 1 of the patent in suit are printed in parallel columns as an Appendix hereto opposite the last page of the Brief.

Seventh Circuit extended, it is believed, at the expense of the public and with respect to an article which now peculiarly affects both the Nation and the public at large, the right to a patent monopoly beyond that authorized by R. S. Sections 4886 and 4920, 35 U. S. C. Sections 31 and 69.

The Record shows (pp. 78 and 79) that more than thirty-three million of these cells were sold in 1941, and that during the first four months of 1942 more than twenty-three million cells were sold. The Record shows further (p. 70) that the Signal Corps of the United States Army purchased from Respondent from June 1940 to July 1941, twenty-one million of such cells. The War Production Board granted Respondent a special permit to purchase additional metal to take care of Government orders (Rec. pp. 75, 76). There appears in the Record at page 73 a letter from Lt. Colonel Thomas L. Clark of the Signal Corps which contains the following statement:

> "The United States Army requires a leak-proof cell and none other for the following reason: Ten cents worth of battery will destroy a $150.00 switchboard in just about twenty-four hours, which makes it evident that there is no conservation in this but mere destruction at the battle front where the loss of communications due to leaky batteries can be least endured."

With the possibility of blackouts where flashlights will be a necessity and in great demand, the importance of these cells to the Nation as a whole is apparent.*

While Petitioners contend that neither Respondent's nor Petitioner's commercial leak-proof cells are made in accordance with the teaching of the patent in suit, it is a fact that there is a great demand by the Government for leak-proof cells of the types here involved. No one but Respondent can furnish the Government these cells without

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*We are reliably informed that since the trial of this case leak-proof cells of the character here involved have been purchased from Respondent by the Armed Forces to the extent of many millions.

being finally liable for profits and damages if the patent is broadly valid and infringed. While it is true that Title 35, U. S. C. A., Section 68 provides that where a patented device is used or manufactured by or for the United States, the owner's remedy shall be by a suit against the United States in the Court of Claims, the Government in most cases requires the supplier or contractor to guarantee to save it harmless in case of suit for patent infringement. One typical provision is as follows:

> "PATENTS. The contractor shall hold and save the Government, its officers, agents, servants, and its employees harmless from liability of any nature or kind including costs and expenses, for or on account of any patented or unpatented invention, article or appliance manufactured or used in the performance of this contract, including their use by the Government."*

Thus it will be seen that any battery manufacturer furnishing the Government any type of leak-proof flashlight dry cell having a metal sheath enclosing the cell and tightly embracing the end closures will have to pay tribute to Respondent if the patent is so broadly construed. The Government would probably wish to have more than one source of supply of these cells. **It is therefore clear that the validity and scope of the claims of the Anthony patent are of great importance to the Nation and the entire battery industry.**

Should another dry cell manufacturer market a similar cell, it would be sold nationally in literally thousands of stores and Respondent would be able to obtain service on a dealer in the Seventh Circuit without the risk of obtaining an adverse decision in a different Circuit so that there is little likelihood of a diversity of opinion in two different Circuits.

If your Petitioner, General Dry Batteries, Inc., should make a different leak-proof cell for the Government or for

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* General Dry Batteries, Inc. has a contract with the Government containing this provision.

others which it was advised by its attorneys did not infringe, it would be liable to a suit for contempt and to punishment and damages. General Dry Batteries, Inc., is willing, able and desirous of furnishing leak-proof cells to the Government, should the Government wish to purchase such cells from it; but it is precluded from doing so by the injunctive Order, although permission was given your Petitioners to dispose of the cells which they had on hand, upon filing a bond.

The conditions with which the American people and the Armed Forces are now confronted with respect to these leak-proof cells make it essential that such cells should not be required to remain subject to a judicially broadened patent monopoly for any period of time unless the patent on which such monopoly is asserted is a good and valid one when tested by the decision of this Court. **It is therefore believed that exceptional circumstances peculiarly affecting the public, the battery industry and the Nation warrant a review of this case by the Supreme Court.***

Petitioners' contentions may be briefly summarized as follows:

1. This case presents exceptional circumstances peculiarly affecting the public, the Armed Forces and the battery industry as a whole; and the public interest will be promoted by a prompt settlement in this Court of the questions here involved.

2. The decision of the Court of Appeals recaptures for the patentee claims which were surrendered to the public during the prosecution of the application.

3. Although there is no conflict of decisions in different Circuits, litigation in other Circuits resulting in a conflict of decisions would not be likely to occur.

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* The Respondent Company and a large part of the battery industry are located in the 7th Circuit.

4. Another issue here involved is whether the Federal Courts of the United States should grant injunctions restraining a manufacturer from continuing the manufacture of articles for which there is or may be an immediate and great need in the prosecution of the War.

JURISDICTION.

This is a suit arising under the Patent Laws of the United States, Judicial Code, Section 24 (7), 28 U. S. C., Sec. 41.

The jurisdiction of this Court is invoked under Section 2490(a) of the Judicial Code as amended by the Act of February 13, 1924 (28 U. S. C., Sec. 347).

The Judgment your Petitioners seek to have reviewed is dated June 5, 1943, the date of entry of the Judgment in the Circuit Court of Appeals.

The Mandate has been stayed by Order of the Circuit Court of Appeals to permit the filing of this Petition for Writ of Certiorari.

QUESTIONS INVOLVED.

(1) Is the Anthony patent No. 2,198,423 broadly valid and infringed by the accused dry cell?

(2) Does the patent describe the product in such full, clear and concise terms as is required by Section 4888 of the Revised Statutes, 35 U. S. C. A., Section 33, and as interpreted recently by the Supreme Court in the following cases:

General Electric Co. v. Wabash Appliance Corp., 304 U. S. 364, 58 Sup. Ct. 899;

United Carbon Co. v. Binney & Smith Co., Supreme Court Law Ed., Advance Opinions, Vol. 87, p. 158.

(3) Did the Court of Appeals, in adjudging the claims broadly valid and infringed, misinterpret and misapply the

principles governing invention and the rights of the patentees and the public as announced by this Court in the case of

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84;

Atlantic Works v. Brady, 107 U. S. 192.

(4) Did the Court of Appeals depart from the decisions of this Court in *Schriber-Schroth v. Cleveland Trust Co.*, 311 U. S. 211 and in *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U. S. 125, in holding the claims in suit broadly valid and infringed and in so doing recapture from the public and for the patentee the subject matter of a cancelled broad claim which had been rejected by the Patent Office in the interests of the public?

(5) Did the Court of Appeals in adjudging the claims in issue infringed by Defendants' different product give to those claims such a broad construction as to recapture from the public and for the patentee subject matter in the public domain?

(6) Has the Circuit Court of Appeals decided a Federal question in a way probably in conflict with the applicable decisions of this Court as to call for an exercise of this Court's power of supervision?

Your Petitioners believe that these questions should all be answered in the affirmative; and respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding such Court to certify and send to this Court, on a date to be designated, a full transcript of the Record and all proceedings of the Court of Appeals had in this case; to the end that this case may be reviewed and determined by this Court; that the Judgment of the Court of Appeals be reversed; and that your Petitioners be granted such other and further relief as may seem proper.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The existing emergency with respect to dry cells of the character here involved would seem to warrant an immediate review by this Court of the basis for the patent monopoly in question. The patent covers dry cells for which there is a great demand by the Armed Forces and should be tested by the decisions of this Court applicable thereto.

II. The Circuit Court of Appeals for the Seventh Circuit, by validating and sustaining the Anthony patent, decided a Federal question in a way probably in conflict with the applicable decisions of this Court in

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84; and

Atlantic Works v. Brady, 107 U. S. 192, 199.

III. The decision of the Circuit Court of Appeals does not definitely outline the scope and breadth of the claims involved and leaves the claims in such a twilight zone of broad scope and domination as to preclude the efforts of any one to make a leak-proof cell having a metal sheath irrespective of the top and bottom structures of the cell. The battery industry as a whole cannot determine the scope and breadth of the claims from the decision of the Circuit Court of Appeals.

IV. The Court of Appeals for the Seventh Circuit, by its decision holding the claims in suit infringed, recaptured for the patentee the subject matter of claims that were canceled and dedicated to the public during the pendency of the application of the patent in suit and consequently decided a Federal question in a way probably in conflict with the applicable decisions of this Court in

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211,

and in

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 125.

V. In view of the fact that there is small chance of obtaining a decision in another Circuit with respect to the validity and scope of the claims involved and also in view of the importance of the patent to the Armed Forces and the entire battery industry, this Court should exercise its power of supervision.

VI. The conditions with which the Armed Forces and the American people are now confronted with respect to the three different leak-proof dry cells here involved make it essential that such cells should not remain subject to a patent monopoly unless the monopoly asserted is a good and valid one when tested by the decision of this Court.

WHEREFORE Your Petitioners respectfully pray for an allowance of a Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. . . . . .

THE GOODYEAR TIRE & RUBBER COMPANY, INC.
and
GENERAL DRY BATTERIES, INC.,
Petitioners,—

vs.

RAY-O-VAC COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court including the Findings of Fact and Conclusions of Law comprises **thirteen** pages of the Record. The opinion of the Circuit Court of Appeals comprises **four** pages of the Record. It is apparent that the Court of Appeals gave but scant consideration to this case. Many defenses were presented and argued in the Briefs and at the hearing. Among these defenses and contentions were:

(1) The patent in suit is invalid in view of the prior art and practice if interpreted sufficiently broad to cover the accused device.

(2) The Plaintiff's (Respondent's) commercial cell does not follow the teaching of the patent in suit.

(3) The Plaintiff's (Respondent's) commercial cell does and must have a double bottom construction and the claims are limited to such a construction.

(4) The Defendants' (Petitioners') cell does not have a double bottom and is not made in accordance

with the disclosure of the patent in suit and is not made like Plaintiff's (Respondent's) commercial cell.

(5) The cell of the patent in suit was entirely experimental and made no impression on the art and was never commercially produced, nor can any commercial success be attributed to it.

(6) The claims in suit are not infringed and are ambiguous, indefinite and invalid if interpreted broadly.

The Lower Court failed to distinguish between the cell disclosed in the patent in suit and the commercial cell which had prompt acceptance and great commercial success; and the Court of Appeals accepted this commercial success as **"well nigh decisive"** of the issue of validity. Such a conclusion is a matter of law and not a question of fact and we submit that the Court of Appeals should not **merely** accept the District Court's ruling on that issue. While it may be true that a dry cell made by Plaintiff (Respondent) had some degree of commercial success, that is quite different from a finding that the commercial cell was so successful as to be decisive of the issue of validity. Commercial success should not be considered at all **except where there is real doubt** as to the validity of the patent and the commercial success is **clearly attributable** to the thing claimed. That is its only role.

> *Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp., et al.*, 294 U. S. 477, 79 L. Ed. 1005, 55 S. Ct. 455.

The decision of the Court of Appeals does not mention Petitioners' contentions that the cell disclosed in the patent in suit was only experimental, was never put on the market, and made no impression on the public whatever, and there is no evidence in the Record that it solved any problem at all.

The decision of the Court of Appeals does not mention any one of the prior art patents relied upon by Petitioners as invalidating or limiting the claims in suit. We do not believe that either the lower Court or the Court of Appeals appreciated the pertinency and the limiting effect of the metal sheath prior art patents when broadly sustaining the claims.

Appeals in Equity cases are trials *de novo*, and all defenses should be considered fully by the Court of Appeals notwithstanding the Findings of the lower Court. Appellate Courts frequently reverse trial courts on Findings of Fact as well as upon findings of invention and infringement. If an Appellate Court is to **merely** accept the lower Court's ruling on the question of invention and infringement, which must necessarily involve an interpretation of the claims, a losing party is in effect denied the right of review of those questions on appeal. The right of a losing party in a lower Court to a full review on appeal is a sacred one which should not be denied or restricted in any manner. It is submitted that a losing party in the District Court is entitled to a full review and to the independent judgment of the Court of Appeals on the findings of the lower Court with respect to validity and infringement which are mixed questions of law and fact. The Appellate Court should not **merely** accept the findings of the lower Court on those questions.*

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* The Court of Appeals for the Seventh Circuit in the case of *Becker v. Loew's Incorporated*, 56 U. S. P. Q. page 460, said:

> "Although we agree that the findings and conclusions of the master adopted by the District Court should not be disturbed **unless there is most cogent evidence of mistake and miscarriage of justice** or error in applying the law, yet where the ultimate finding is a conclusion of law or at least a determination of **a mixed question of law and fact**, as it is in this case, it is subject to judicial review, and our duty is not to place a perfunctory stamp of approval upon the work of the District Court, but rather to provide a real review. This we have done, and have concluded there has been no infringement and no unfair competition. Accordingly, the judgment of the District Court is reversed." (Emphasis supplied.)

The decision of the Court of Appeals does not discuss the prior art or the limiting effect of prior patents at all. It does not discuss the question of file wrapper estoppel. It does not refer to Petitioners' contention that Respondent's commercial cell and the accused cell do not follow the teaching of the patent in suit.

The Court of Appeals referred to the fact that the lower Court had found that there was considerable oral testimony given as to the wide acceptance of the product immediately following its appearance on the market. The Court of Appeals said:

> "The extent to which such acceptance was traceable to the patent and not to the advertising or other efforts of the plaintiff was essentially a fact question, upon which the District Judge's findings are entitled to great weight. Moreover, the effect of such acceptance and the extent of the acceptance, in a doubtful case, is a factor at times **well nigh decisive** of the issue of validity." (Emphasis supplied.)

The Court of Appeals said further:

> "In other words, the issue as to whether the invention covered by the patent in suit represented a patentable advance in the art was in part a strictly factual one, upon which much evidence was received, and a finding thereon was made by the District Court. **We accept the finding of the District Court** on this, in part, factual issue of immediate and extensive use which followed the appearance of the patented dry cell." (Emphasis supplied.)

The law is well settled to the effect that in a doubtful case the question of commercial success should be considered, and may tip the scales in favor of invention. However, we believe that the Court of Appeals erred in accepting the finding of the District Court **on the question of whether Respondent's commercial cell was disclosed in the patent in suit.** Whether or not the commercial cell followed the teaching of the patent in suit was **a question of**

law, upon which your **Petitioners were entitled to a full review of the record and to the independent judgment of the Court of Appeals.**

Rule 52 of the Rules of Civil Procedure promulgated by the Supreme Court provides that

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

However, Rule 52(b) provides further that:

> "When findings of fact are made in actions tried by the Court without a jury, **the question of the sufficiency of the evidence to support the findings** may thereafter be raised whether or not the party raising the questions has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment." (Emphasis supplied.)

This case, of course, was heard by the District Court without a jury, and we submit that under Rule 52 the Court of Appeals **is required to give a full review** of the findings of fact and conclusions of law of the lower Court on the question of validity and infringement, as well as upon the question of whether the commercial cell followed the teachings of the patent in suit. Furthermore, it is believed that these questions may rightly be said to be important. In fact, they are of paramount importance in the administration of patent law.

If the Court of Appeals is to accept the lower Court's rulings on the questions of validity and infringement, then **an appeal in patent cases becomes a vain and useless thing.** There is a growing tendency in that direction. This Court should authoritatively decide this point of law and the effect of Rule 52 on this procedure.

On the question of infringement the Court of Appeals said:

> "On this issue, the controversy becomes a narrow one and, we may add, also a close, a doubtful one."

It therefore appears that, although the Court of Appeals held the invention to be a doubtful one and a narrow one, it nevertheless gave the claims a very broad interpretation in order to find the infringement. This also is entirely inconsistent with the applicable decisions of this Court.

ARGUMENT.

POINT I.

The great demand for dry cells of the type here involved, especially by the Armed Forces, would seem to warrant an immediate review by this Court of the basis of the patent monopoly in question because the Government is in need of dry cells of the type here involved and other battery manufacturers should be permitted to supply the Government's needs. Exceptional circumstances peculiarly affecting the public are sometimes deemed sufficient to warrant the granting of the right to examine the soundness of a decision of a Circuit Court of Appeals even in the absence of conflicting decisions as to the validity of the patent. A few instances are

American Fruit Growers Inc. v. Brogdex Co., 283 U. S. 1;

DeForest Radio Co. v. Gen. Elec. Co., 283 U. S. 664;

Altoona Theatres v. Tri-Ergon Corp., 294 U. S. 464, 477;

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211;

Carbice Corp. v. Am. Patents Corp., 283 U. S. 27;

Leitch Mfg. Co. v. Barber Co., 302 U. S. 458, 461;

Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759, 62 S. Ct. 865;

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 125;

United Carbon Co. v. Binney & Smith Co., S. Ct. Law Ed. Advance Opinions, Vol. 87, page 158.

In the *Exhibit Supply Co.* case, *supra*, the Supreme Court said:

> "Although there is no conflict of decision we were moved to grant the petition by the nature of the questions presented together with a showing that the industry affected by the patent is located in the Seventh Circuit so that litigation in other Circuits resulting in a conflict of decisions would not be likely to occur."

The same situation exists in this case. Respondent would obviously not risk the possibility of obtaining an adverse decision in another Circuit. If Respondent wished to litigate this patent again it would in all probability bring suit against a dealer or customer in the Seventh Circuit.

The power of this Court to grant a Writ of Certiorari is "co-extensive with all possible necessities." *Forsyth v. Hammond*, 166 U. S. 506.

POINT II.

The Circuit Court of Appeals for the Seventh Circuit in upholding the patent in suit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court and more particularly

Cuno Corp. v. Automatic Devices Corp.,
Exhibit Supply Co. v. Ace Patents Corp.,
Schriber-Schroth Co. v. Cleveland Trust Co. (all *supra*).

By its decision, apparently in conflict with the fundamental principles of Patent Law, the Circuit Court of Appeals, it is believed at the expense of the public with respect to an article which now peculiarly affects both the Nation and the public at large, has misapplied or refused to apply the applicable decisions of this Court. The patent in suit when broadened by judicial decree is of great importance to the Government, to the battery industry and to the public.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the recent decisions of this Court setting forth the standard of what constitutes invention, and distinguishing between mere skill of the art and **the flash of genius** necessary to constitute invention.*

This Court in the case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, said:

> "That is to say, the new device, however useful it may be, **must reveal the flash of creative genius** not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain." (Emphasis supplied.)

Measured by this standard Anthony made no invention.

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* The Court of Appeals for the Seventh Circuit has refused to apply this test (See *Chicago Foundry Co. v. Burnside Foundry Co.*, 132 Fed. (2d) 812, in which Judge Evans said (page 817)):

> "**The test of a 'flash of genius' should be rejected** not only because it is incapable of acceptable definition but because it injects into the statute something not appearing there."

And further on page 818 the Court said:

> "Congress was interested in protecting the product of a mind—not in whether it came as a flash to the mind or as a happy thought or by long-painstaking search and experimentation.
>
> Approaching the specific question in this case—the patentable novelty of the apparatus described in the two claims of plaintiff's patent here involved, **we are rejecting the flash of genius test.** We are adhering to the view which we believe all scientific knowledge and advance in knowledge is built on—the step-by-step advance—the test and error method. Also we are following the view that invention lies in, and must be determined by, the product, not in the mental activities or contortions that brought it forth." (Emphasis supplied.)

POINT III.

The Court of Appeals for the Seventh Circuit, by its decision holding the claims in suit valid and infringed, recaptured for the patentee the subject matter of a claim that was cancelled and dedicated to the public during the pendency of the application of the patent in suit, and consequently decided a Federal question in a way probably in conflict with the applicable decisions of this Court, particularly

Schriber-Schroth Co. v. Cleveland Trust Co., and *Exhibit Supply Co. v. Ace Patents Corp.*

POINT IV.

The Court of Appeals for the Seventh Circuit, by its decision holding the claims in suit valid and infringed, decided a Federal question in a way probably in conflict with the applicable decisions of this Court and particularly in the case of

United Carbon Co. v. Binney & Smith Co., Sup. Ct. Advance Op., L. Ed., Vol. 87, p. 158.

The claims in suit, when interpreted broadly, are indefinite and ambiguous and fail to comply with Section 4888 of the Revised Statutes, 35 U. S. C., Section 33. In the *United Carbon* case the Supreme Court said (page 163):

> "The statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise."

And further, pages 163-164, the Court said:

> "An invention must be capable of accurate definition and it must be accurately defined to be patentable. Cf. *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364."

The Supreme Court held the patent there in suit invalid because of inadequate disclosure and for failure to define

accurately the size of the carbon particle used, and for failure to define accurately such terms as "substantially pure," "comparatively small," "commercially uniform," "spongy," and "porous." Similar defects appear in the patent here in suit. The claims in suit stand indefinite and ambiguous by reason of the Courts' decisions, and the specification fails to aid in the interpretation thereof.

WHEREFORE Your Petitioners earnestly pray that the Petition for Writ of Certiorari be granted, the cause reviewed, and the decree of the Circuit Court of Appeals for the Seventh Circuit reversed.

Respectfully submitted,

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APPENDIX.

This Broad Original Claim 5 was Deliberately Canceled from the Patent in Suit and Never Recaptured:

A leak immunized dry cell provided with

(1) circuit terminals

  (a) at opposite ends comprising

(2) **a cup shaped metal electrode containing electrolyte**

(3) a carbon electrode and

(4) depolarizing mix in said electrolyte

(5) a top closure for said cup shaped electrode

  (a) provided with a perforated cap resting on said carbon electrode, and

(6) a sheet metal shell

  (a) enclosing the side walls of the cup shaped electrode and

  (b) gripping the top and bottom of the cell with sufficient force to prevent fluids from escaping therebetween.

Note: Claim 5, which was canceled, does not include the limitations in bold type of claim 1 of the patent in suit and that element (5) of claim 1 is omitted entirely.

Claim 1 of the Anthony Patent in Suit:

A leak immunized flashlight dry cell provided with

(1) circuit terminals

  (a) at opposite ends comprising

(2) **a hollow cylindrical zinc metal electrode containing electrolyte**

(3) a centrally disposed carbon electrode and

(4) depolarizing mix in said electrolyte

(5) **a bottom closure for the cell affording a terminal for one of the electrodes**

(6) a top closure for the cell provided with a terminal for the other electrode

  (a) electrically insulated from the first mentioned terminal, and

(7) a protecting sheet metal sheath insulated from both of said electrodes and

  (a) enclosing the side walls of said metal electrode and

  (b) tightly embracing said closures so as to prevent leakage of the electrolyte from the unit.

Note: Elements (2) and (5) must mean a zinc cup plus an additional bottom closure which the accused cell does not have.